

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

3467 ✓

V. 3467

ARTHUR B. SMITH,

Petitioner-Appellant,

vs.

No. 22203

THE PEOPLE OF THE STATE OF CALIFORNIA,  
ET AL.,

Respondents-Appellees.

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General  
of the State of California

DERALD E. GRANBERG  
Deputy Attorney General

MICHAEL BUZZELL  
Deputy Attorney General

6000 State Building  
San Francisco, California 94102  
Telephone: 557-0311

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WM. B. LUCK, CLERK

Attorneys for Respondents-Appellees

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APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On January 20, 1965, a judgment of conviction was entered against appellant for the crime of murder. Appellant





appealed this conviction, and the conviction was affirmed by the California Court of Appeal, Second Appellate District, Division Three. A copy of the Court of Appeal's opinion is attached as Appendix A. The California Supreme Court denied on February 16, 1966, petitioner's application for a hearing. No additional efforts to secure relief were made by petitioner in the California courts.

B. Proceedings in the Federal Courts

In May of 1967, appellant petitioned the United States District Court for the Northern District of California for a writ of habeas corpus. (RT 1). Judge Carter of that court denied the petition on May 3, 1967 (RT 27-28). On June 2, 1967, a certificate of probable cause for appeal was issued (RT 33), and on June 30, 1967, appellant was granted leave to proceed in forma pauperis (RT 59-61).

APPELLANT'S CONTENTIONS

1. Appellant's trial counsel was inadequate.
2. Incriminating statements were introduced into evidence against appellant in violation of his constitutional rights.

SUMMARY OF APPELLEE'S ARGUMENT

I. With respect to the issue of adequacy of trial counsel, appellant has failed to exhaust state remedies.

II. Petitioner has not alleged a violation of federal constitutional rights.



## ARGUMENT

### I

WITH RESPECT TO THE ISSUE OF  
ADEQUATE TRIAL COUNSEL, APPELLANT  
HAS FAILED TO EXHAUST STATE  
REMEDIES.

Appellant in his petition argued that he did not receive adequate aid from counsel at his trial. This issue was not raised on appeal in the California Court of Appeal (See Appendix A), nor has it been raised in any court of this state, even though in California habeas corpus is available to test the competency of trial counsel. See, e.g., In re Poe, 65 Cal.2d 25 (1966); In re Rose, 62 Cal.2d 384 (1965).

"A state prisoner may not bypass state courts which have the first duty to determine his rights. He must have exhausted all practicable state court remedies before he becomes entitled to federal court consideration of his claims." Holley v. Cheuvront, 351 F.2d 615 (9th Cir. 1965), citing Fay v. Noia, 372 U.S. 391 (1963) and Pate v. Wilson, 348 F.2d 900 (9th Cir. 1965).

It is clear, therefore, that inasmuch as appellant failed to raise the issue of competency of counsel in the California courts, the District Court properly refused to



consider the claim. Title 28 U.S.C. § 2254.

## II

### APPELLANT HAS NOT ALLEGED A VIOLATION OF FEDERAL CONSTITUTIONAL RIGHTS

Appellant argues that statements taken in violation of his rights as enunciated in Escobedo v. Illinois, 378 U.S. 478 (1964) and People v. Dorado, 62 Cal.2d 338 (1965) were introduced against him at trial. The California Court of Appeal held that the rule of Dorado had been violated, but that the error was harmless. See Appendix A.

The determination by the California Court of Appeal that Dorado was violated is, of course, immaterial to the instant appeal. As the District Court properly held, appellant did not establish a violation of Escobedo, for he did not allege that he requested counsel prior to the interrogation eliciting the challenged statements. See Johnson v. New Jersey, 384 U.S. 719, 734 (1966); Collins v. Wilson, 368 F.2d 995, 996 (9th Cir. 1966). No violation of a federal constitutional right being alleged with respect to appellant's second ground for issuance of the writ, the court below properly ruled that the contention was without merit.

### CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying



appellant's petition for the writ of habeas corpus should be affirmed.

Dated: November 15, 1967.

THOMAS C. LYNCH, Attorney General  
of the State of California

DERALD E. GRANBERG  
Deputy Attorney General

A handwritten signature in dark ink, appearing to read "Michael Buzzell", is written over the typed name.

MICHAEL BUZZELL  
Deputy Attorney General

Attorneys for Respondents-Appellees






CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 15, 1967.

  
MICHAEL BUZZELL  
Deputy Attorney General



A majority of the signers of the following opinion certify that it does not meet the standard for official publication under Rule 976.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA *STOUTT*

SECOND APPELLATE DISTRICT

DIVISION THREE

DOCKET
CR. L.A.
No. <i>65-265</i>
Entered by <i>cc</i>
Date <i>12-26-65</i>

THE PEOPLE,

Plaintiff and  
Respondent,

vs.

ARTHUR BENJAMIN SMITH,

Defendant and  
Appellant.

2nd Criminal No. 10778

DIST. CLERK OF DISTRICT COURT

DEC 26 1965

Deputy Clerk

Appeal from judgment of the Superior Court of Los Angeles County. Donald R. Wright, Judge. Affirmed.

For Appellant: Patrick J. Sampson, under appointment by the District Court of Appeal.

For Respondent: Thomas C. Lynch, Attorney General; William E. Jones, Assistant Attorney General; Bradley A. Stoutt, Deputy Attorney General.

The defendant was found guilty of murder in the first degree in a nonjury trial, and was sentenced to life imprisonment in the state prison. He predicates his appeal upon the sole ground that the admission into evidence of the transcript of the interrogation of the defendant constituted



versible error under People v. Donado, 62 Cal. 2d 338.

The defendant was estranged from his wife. On August 8, 1964 Eldon Smith, aged sixteen, was home with his mother when his father, the defendant, arrived about 11 a.m. to get his clothes. His mother left the living room and went to her bedroom to get dressed for work. His father went into the bedroom. "They were talking about her reconsidering about divorce. And she told him to go back in the living room." About ten to twenty minutes later Eldon observed his father return to the bedroom with a razor in his hand, and slam the bedroom door shut. It automatically locked. Almost simultaneously Eldon heard his mother scream and she "hollered" for him to "call the police." Eldon ran next door and could still hear his mother scream while phoning the police. She was no longer screaming when he returned. The bedroom door was still locked. He heard his mother say "'Oh, God, I didn't mean to do it.'"

When Deputy Sheriff Tolfe arrived he observed a female lying on the floor with blood all over her clothing. The defendant was cradling her in his arms, sobbing and stating, "My what did I do." The officer asked the defendant, "'What you do?'" The defendant reached to the floor and picked up a straight-edged razor, handed it to the officer and said, "'I did it with this, sir.'"

A short time later Deputy Sheriff Jones arrived. The defendant was standing in the living room. He was crying, "Oh, God, help her. I didn't mean to hurt her." The officer



received three cuts on the left side of defendant's neck and  
killed him where he got them. The defendant replied that he did  
and removed a pocketknife from under the pillow of the victim.  
The victim died before the ambulance arrived. A deputy medical  
examiner ascribed the cause of the death of the victim to be a  
severation of the left common carotid artery.

On the evening of the 8th or 9th of August, 1964  
the owner of a trailer park entered a trailer which she had rented  
to the defendant wherein she found a wrapper for a "dubl duck"  
razor on the bed. A dubl duck razor was the death instrument.

The defendant was interrogated by Deputy Sheriffs  
L. Shelund and Arthur Stoyanoff of the Los Angeles County  
Sheriff's Department about 7 p.m. the same day at the East Los  
Angeles Sheriff's Station in the presence of a stenographer. He  
denied entering the bedroom of his wife with a razor in his hand  
and denied bringing a razor to the house. He stated that when  
his wife accused him of going out with another woman he observed  
she had a knife in her hand. He knocked the knife out of her  
hand. He further stated that she went to her purse and obtained  
the razor with which she was going to attack him. He took the  
razor away from her and cut her once with it. When asked whether  
he cut her more than once the defendant replied, "I don't know.  
When I knocked the razor out of her hand and grabbed it and swung  
it at her, then when she fell, I fell with her. Whether I cut her  
I don't know, but I grabbed her and started hollering for an am-  
bulance." The defendant stated he was trying to defend himself







when his wife was out. That he felt his wife was trying to hurt him because she told him that she was going to get rid of him.

At the time of the trial the defendant took the stand and testified that his wife had cut her own throat. The defendant contends that the first statement made to Officer Tolfa was an admission and that the second statement made to Deputy Sheriffs Sholund and Stoyanoff was a confession, therefore he maintains, the judgment of the trial court should be automatically reversed under the rule of People v. Dorado, supra, 62 Cal. 2d 38. The converse of these contentions appears to be more tenable. An admission as applied to criminal law is something less than a confession, and is but an acknowledgement of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only toward the proof of the ultimate act of guilt. On the other hand, a confession by a defendant leaves nothing to be determined, in that it is a declaration of intentional participation in a criminal act, and must be a statement of such a nature that no other inference than the guilt of the defendant may be drawn therefrom. (People v. Strong, 30 Cal. 151; People v. Porton, 49 Cal. 632; People v. Velarde, 59 Cal. 457; People v. Miller, 122 Cal. 84 [54 Pac. 523].) As stated in Michaels v. People, 208 Ill. 603 [78 N.E. 747], citing 3 Cyc. 2; 1 Greenleaf on Evidence, sec. 173; Johnson v. People, 197 Ill. [64 N.E. 226]: 'A confession is a voluntary acknowledgment by a person charged with the commission of a crime that he is guilty of the offense. It is a voluntary declaration by a person charged



with a crime of his agency or participation in the crime. It is not equivalent to statements, declarations, or admissions of facts exonerating in their nature or tending to prove guilt. It is limited in its meaning to the criminal act, and is an acknowledgment or admission of participation in it." (People v. Ferdinand, 94 Cal. 555, 568-9.)

The statement to the effect that he cut his wife's throat with a straight-edged razor is an admission of guilty conduct which involves criminal intent. The specific intent to kill is presumed from the guilty conduct admitted by him and thus would come within the category of a confession. But when the statement of guilty conduct is such that it does not involve criminal intent where it constitutes facts amounting to justification or excuse for the defendant's acts it is an admission rather than a confession. (People v. Elder, 55 Cal. App. 644.) We, therefore, conclude that the second statement which attempts to negative an unlawful intent is an admission rather than a confession.

The appellant concedes that the statement made to Officer Telfs to the effect that the defendant had cut his wife with a straight-edged razor was legally admissible. At the time the said statement was made by defendant the officer had just arrived at the scene. The defendant was neither in custody, nor had suspicion been caused upon him, nor had the interrogation reached an accusatory stage, therefore the Paro rule requiring the law enforcement officer to inform a defendant of his right to counsel or of his absolute right



remain silent, is inapplicable. (People v. Garratt, 235 Cal. p. 2d \_\_\_\_.) Moreover, the opinion in People v. Dorado, supra, Cal. 2d 338, 354, expressly states that "Nothing that we have said, of course, should be interpreted to restrict law enforcement officers during the investigatory stage from securing information from one who is later accused of the crime or from obtaining answers to their questions. Indeed, any statements obtained without coercion, including, of course, the unsolicited, spontaneous confession, given in the absence of the requirements for the accusatory stage, may be admitted into evidence."

In the instant case it appears that the accusatory stage was reached when the defendant was interrogated at the Sheriff's station. The defendant had previously admitted he committed the crime resulting in the death of his wife; he was in custody; the investigation focused upon him; and the questioning lent itself to obtaining incriminating statements. Under the Dorado rule it was incumbent upon the officers to inform the defendant of his right to counsel and to remain silent prior to the interrogation. It was, therefore, error to admit such statement. (Escobedo v. Illinois, 378 U.S. 478, 491; People v. Dorado, supra, 62 Cal. 2d 333; People v. Stewart, 62 Cal. 2d 571.) Dorado further holds (p. 356): "Although under some circumstances the introduction into evidence of statements obtained from a defendant during police interrogation in violation of his right to counsel and his right to remain silent may constitute





unless error, we are convinced that the error is necessarily prejudicial when the statements are confessions." The second statement which we determine to be an admission is not prejudicial as such, and thus does not automatically require a reversal. (People v. Schader, 62 Cal. 2d 716, 723.) The effect of the second statement is inferentially exculpatory, and in our opinion comes within the harmless error rule announced in People v. Watson, 46 Cal. 2d 813, 833-834.

However, even if we were to assume that the second statement was a confession, nevertheless the defendant had made an earlier admissible confession. The introduction into evidence of a confession obtained by the police in violation of People v. ..., 62 Cal. 2d 338, is harmless error where the defendant made an earlier admissible confession. (People v. Cotter, 63 Cal. 2d \_\_\_\_; People v. Jacobson, 63 Cal. 2d \_\_\_\_; People v. ..., 234 Cal. App. 2d \_\_\_\_.)

A review of the record impels the conclusion that the defendant suffered no prejudice by the introduction of the second statement.

In view of the evidence, there is no reasonable probability that the trial court would have reached a result more favorable to the defendant if the statement complained of had been

Advance Report Citation: 63 A.C. 434, 410-16.

Advance Report Citation: 63 A.C. 335.

Advance Report Citation: 234 A.C.A. 557, 571.





cluded. (People v. Watson, supra, 46 Cal. 2d 818, 836; California Constitution, Article VI, section 4-1/2.)

Judgment affirmed.

BROCKER, J. pro tem

2 concur.

SHIM, P. J.

FORD, J.

